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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Now comes petitioner, Skyline Homes, Inc., an Indiana corporation, by Larry S. Davidow, its attorney, and respectfully shows unto this Court as follows:

REFERENCE TO PROCEEDINGS FOLLOWING THE ISSUANCE OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On December 2, 1964, the National Labor Relations Board filed its motion to adjudicate Skyline Homes, Inc., in civil contempt and for other civil relief. Skyline filed its answer and brief in opposition to the motion on the contempt charge. Thereafter, on or about February 9, 1965, an Order of Reference was entered by the United States Court of Appeals for the Fifth Circuit appointing Joseph W. Kaufman as Special Master to take testimony and receive evidence with respect to the issues raised by the pleadings, a copy of which Order of Reference is hereto appended on page 23.

Pursuant to the Order of Reference, a pre-trial hearing was had and thereafter, the hearing proper was held in Ocala, Florida, on April 21 and 22, 1965, and stenographically reported.

Thereafter the Report of the Special Master containing recommendations as to findings of fact and conclusions of law and conclusions of law proper, as well as a recommended decree, was filed in the United States Court of Appeals for the Fifth Circuit, which said Report comprising 28 pages and being a part of the record in the proceedings in the Court of Appeals, is made a part hereof by reference.

Objections to the Report and Recommendations of the Special Master were filed on behalf of Skyline Homes, Inc., which are a part of the record in the proceedings in the United States Court of Appeals Fifth Circuit and are made a part hereof by reference.

The NLRB filed objections to the finding of the Special Master that: "However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree."

The Court of Appeals granted oral argument which took place in the Court House in Jacksonville, Florida, in January, 1966.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On August 11, 1967, the United States Court of Appeals for the Fifth Circuit filed its opinion on the petition of the NLRB to adjudicate Skyline Homes in civil contempt, in which it stated, "The Court substantially adopts the conclusions and findings of the Master. Accordingly, Skyline is adjudged in civil contempt of this Court." (Page 4 of the Opinion). A copy of the Opinion is appended hereto, on page 27.

Skyline Homes, Inc. filed its petition for rehearing, a copy of which is appended hereto on page 32, to which the NLRB made no reply. The Court of Appeals on September 22, 1967, entered an Order, without opinion, denying the petition for rehearing.

STATUTORY PROVISIONS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

Title 28, U.S. Code Annotated, section 1254 (1).

Rule 19 of the Revised Rules of the Supreme Court of the United States, Section 1(b), which provides:

> "Where a court of appeals has rendered a decision *in conflict with the decision of another court of appeals on the same matter;* or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or *has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court;* or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Emphasis ours.)

CONCISE STATEMENT OF THE CASE

Following the denial of the petition for Writ of Certiorari by this Court Petitioner posted the notices required by the Decree of the United States Court of Appeals. It met on two occasions with the Union representatives for the purpose of negotiation, each of which meetings was terminated by the Union. At the last meeting on April 2, 1964, it was agreed that the Union would notify Petitioner's counsel of a date for the next meeting after it had had an opportunity to go into the matter of what it wished to negotiate about. Instead, the Union, on April 6, 1964, sent a letter to Skyline Homes, Inc., breaking off all negotiations unless the company agreed to state in the

written contract that the Union was the exclusive bargaining agent for all of its employes. The employer requested that negotiations continue, the last letter being sent to the Union on May 8, 1964, and a copy to the National Labor Relations Board 12th Region (Exhibit 16 attached to the transcript of the proceedings). No attempt was made on the part of the Union to negotiate following the April 2 meeting, although Petitioner has been ready and willing to resume negotiations at any time requested by the Union; this, even in the face of a claim by counsel representing a majority of the employes that the Union did not represent them. Following this, the employes' counsel filed a charge of unfair labor practice against the employer.

During negotiations with the Union, employer-Petitioner sent letters to its employes advising them of the negotiations that were taking place and of their rights under the Labor Management Relations Act and the Constitution of the State of Florida.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

Petitioner Skyline Homes, Inc. seeks a review of the Order of the United States Court of Appeals Fifth Circuit, adjudicating Petitioner in civil contempt, for the following reasons:

1. The Court's Opinion denies Petitioner its right to legally communicate with its employes, as provided by the Labor Management Relations Act, Section 158(c), Title 29, U.S. Code Annotated, which provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed or graphic, or visual form, shall not constitute or be evidence of an unfair labor practice

under any of the provisions of this subchapter, *if such expression contains no threat of reprisal of force or promise of benefit.*" (Emphasis ours.).

2. The adjudication of civil contempt denied the Petitioner the protection and guarantee of freedom of speech of the First Amendment to the Constitution of the United States.

3. The Opinion of the Court of Appeals is a misinterpretation of Section 7, Title 1(8) of the Labor Management Relations Act, which provides:

> "'Employees shall have the right to self-organization, to form, join, or assist organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)." (Emphasis ours.)

4. The Court of Appeals' decision is in conflict with opinions of this Court and U. S. Courts of Appeals of its own and other circuits.

STATEMENT AND AMPLIFICATION OF QUESTIONS PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Fifth Circuit in accepting the finding of the Special Master that Skyline "acted in bad faith by sending erroneous and misleading letters to the employes as to the relationship between the union and the employees" has failed to recognize and give effect to the provisions of the Labor Man-

agement Relations Act, Section 7, Title 1 (8) *supra*, which provides:

> "Employees shall have the right to self-organization, to form, join, or assist organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis ours.)

The Labor Management Relations Act asserts the right of employes to belong or not to belong to a union. The hearing before the Special Master disclosed to the Petitioner for the first time that none of its employes was a member of the Union and, that the Union had never made any attempt to have the employes join the Union, and this condition had existed up to and including the date of the hearing.

The Opinion of the Appeals Court completely overlooks and/or ignores the undisputed fact that while the Petitioner had a good faith doubt as to the Union being the choice of a majority of its employes as their exclusive bargaining agent (particularly after proceedings were taken by the employes through their own counsel for an election, which petition for election was denied by the NLRB), Petitioner learned for the first time at the hearing before the Special Master that (1) none of its employes had ever been a member of the Union; (2) the Union had never sought to persuade any of its employes to join the Union, and (3) there had never been any organizational drive to recruit Petitioner's employes to join the Union. The insistence,

therefore, on the part of the Union and the NLRB on demanding the expression in writing as to the Union being the exclusive bargaining agent of its employes was a direct violation of and in conflict with the decision of this Court in the case of *Int. Ladies Garment Workers Union v. N.L.R.B.* and *Altman Texas Corp.*, 366 U.S. 731; 6 L Ed 2d 762.

2. Petitioner contends that it had the right to send letters to its employes in pursuance of Section 158 (c) *supra*. The Opinion of the Court of Appeals is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in the cases of *Indiana Rayon Corp. v. N.L.R.B.*, 355 F 2d 535; *N.L.R.B. v. Herman Wilson Lumber Co.*, 355 F 2d 426, and *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474; 95 L. Ed. 456.

In the case of *Indiana Rayon Corp. v. N.L.R.B., supra*, the Court of Appeals held that evidence did not support the findings to the effect that employer had attempted to interfere with, restrain or coerce employes through activity of a supervisory employe or in speech or letter by the employer. The Court of Appeals on page 539 said:

> "(4-5) An employer may express himself freely on labor matters *as long as his statements do not contain threats of reprisal or force or promise of benefits.* 29 U.S.C.A. §158(c). Cf. *Sax v. National Labor Relations Board, supra,* at 772-773. Such inferences as appear in the letter and the speech are little more than rhetoric and do not reach the plane of threat or promise. The Board's inferences are scholastic and, we hold, are not supported by substantial evidence." (Emphasis ours.)

And on page 540:

> "Although this evidence of good-faith may be less than overwhelming, the Board in rejecting the trial examiner's conclusion, cited no contrary evi-

dence whatsoever, but instead engaged in sophistry. Because the board concluded that Rayon was guilty of the §8(a)(1) violations discussed above, it reasoned that Rayon was unwilling to permit the question concerning representation to be resolved in a fair election. From this conclusion, it reasoned back that Rayon's refusal to bargain was not made in good faith, but in order to gain time in which to dissipate the union majority.

"(6) Such evidence as the Board has presented in support of its findings of §8(a)(5) violation has been created out of its own findings of §8(a)(1) violations. This self-supporting scaffolding of unfair labor practice findings must all fall together, for the record as a whole does not support the Board's conclusion. There is no substantial evidence that Rayon's refusal to bargain was not a good faith refusal stemming from its disbelief in the union's majority status."

The case of *N.L.R.B. v. Herman Wilson Lumber Company,* 355 F 2d 426, U. S. Court of Appeals Eighth Circuit (1966) was a petition for enforcement of an order upon a finding that respondent had violated Section 8(a)(1) of the Labor Management Relations Act. The Court said that the question then before the Court turned upon the interpretation of the effect of the written documents, "whether or not they can be said to have threatened respondent's employees with reprisal or force if the union had won the election, or, conversely, whether the campaign material is within the protection afforded by §8(c)." (428)

An examination of the handbills and text of the speeches showed that the respondent had stated that it was "not compelled to agree to a union proposal or to make a concession to the union; that it would engage in 'hard

bargaining'; that the only way a union can force your Company to do anything it is unwilling to do would be to pull you out on strike; and that 'if the Union calls an economic strike * * * you can be permanently replaced.'" (429) The president's speech contained the language, "I will fight the union in every legal way possible. * * * If a union wins all it wins is the right to bargain—nothing more * * *. If the union calls an economic strike, you place your job on the line. You can be permanently replaced. You can lose your job. An economic strike could cause us to lose business. This might cause us to have to shut down the plant. If so, you would be without a job." (429)

The Court of Appeals reviewed a number of decisions and quoted from the opinion of the Supreme Court of the United States in the case of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. Ed. 456, and on pages 429 and 430 said:

> "'Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
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> * * *
>
> "'* * * Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.'"

and on page 432:

> "(5) Inasmuch as respondent did not, in any of the handbills or speeches, state anything more than its legal rights, in an entirely legal manner, we are persuaded to hold that the challenged remarks fall within the protection afforded by §8(c). The conclusion is inescapable that the truthful utterances protected, as they are, by the First Amendment to the Constitution and authorized by §8(c), were improperly interpreted by the trial examiner and a majority of the Board as a basis for authorizing an unfavorable inference. Accordingly, enforcement of the Board's order is denied."

3. The Petitioner had the right to express its opinion as to the possibility of an election, as well as the right of its employes to refrain from any or all of the activities outlined in section 7, Title 1(8) *supra.*

The Petitioner's letters could not possibly have had anything to do with the negotiations that had been going on between it and the Union and were to have continued. The letters had nothing to do with wages, hours or working conditions, the categories to be discussed in the negotiations.

The last negotiation meeting between Petitioner and the Union, held on April 2, 1964, was adjourned at the request of the Union. The Union was to notify counsel for petitioner of a subsequent date for the next meeting, at which time it would present proposals to be discussed, touching upon the categories outlined in the Labor Management Relations Act. It was only after the Union representative met with the officials of the 12th Region of the NLRB and was instructed or encouraged by them, that the letter of April 6, 1964, was sent to Petitioner. There was nothing in that letter concerning the letters which Petitioner had sent to its employees. The April 6th Union letter, inspired

and directed by the N.L.R.B. which created the artificial impasse, was predicated solely upon the specious insistence upon the use of specific language in the contract relating to the recognition of the Union as the sole bargaining agent for Petitioner's employes. It is Petitioner's position that the testimony abundantly sustains its charge that the "impasse" was devised and instigated by the 12th Regional office of the N.L.R.B., to be used as the pretext for initiating contempt proceedings. The Petitioner was justly apprehensive as to this possibility and so expressed itself in a letter to the Union on May 8, 1964, *sequi.*

Section 12 of the Declaration of Rights of the Constitution of the State of Florida provides:

> "Double jeopardy; self-incrimination; eminent domain; right to work—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. *The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union,* or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." (Emphasis ours.)

There can be no question about the fact that the Constitution of the State of Florida contains a "right to work" clause which permits one to work without the necessity of joining any union, and gives the employe the right to either join or refrain from joining any union. The Union representative himself and the Petitioner admitted there was no compulsion to join the Union.

It is the Petitioner's position that the statements contained in the letters sent out to its employes were within the provisions of the Florida Constitution *supra,* as well as the Labor Management Relations Act, particularly Section 7, Title 1 (8).

Section 7 specifically establishes the right of employes to self-organization, to form, join or assist organizations and to bargain collectively through representatives of their own choosing. This section also specifically provides that the employe has the right to refrain from any or all such activities. In other words, it is the contention of the Petitioner that this provision is compelling and positive and certainly means what it says, namely, that any employe has the right to either engage in or refrain from engaging in any of the activities mentioned in said section, including the right to bargain or not to bargain through union or other representatives.

4. Petitioner had the right to express its opinions as guaranteed by the First Amendment of the Constitution of the United States.

5. The Court of Appeals ignored the unchallenged and reasonable explanation of Petitioner's inability to sooner post the notices involved, which was due to the loss of the notices when Petitioner moved its offices. Upon new notices being requested and furnished, they were posted accordingly.

6. The Court of Appeals, in adopting the findings of the Special Master, completely ignored the fact that the Union broke off negotiations with the Petitioner for the reason stated in the letter of April 6, 1964, sent by a Union representative to the Petitioner, as follows:

Skyline Homes, Inc.
P.O. Box 1734
Ocala, Florida

Att.: Mr. Max Miller, General Manager

Dear Mr. Miller:

When you have changed the position that your Attorney, Larry S. Davidow, took at our meeting April 2nd, 1964, in reference to Carpenters Local Union #2292 of Ocala being the exclusive bargaining agent for all your employees, please contact us.

If we do not hear from you we will assume that your refusal to recognize us on April 2nd continues to be your position.

Sincerely yours,
Warren P. Conary, Rep.

As late as May 8, 1964, counsel for Petitioner sent a letter to Warren P. Conary as follows:

Mr. Warren P. Conary
P.O. Box 1518
Stuart, Florida 33494

Re: Skyline Homes, Inc.

Dear Sir:

In replying to your letter of May 4, 1964, acting on behalf of Skyline Homes, Inc., we decline to enter into controversy with you concerning the allegations you have made. The position of Skyline has been fairly stated in a letter sent to you previously, the essentials of which are that Skyline Homes, Inc. has met with you on two different occasions and was and is ready now to meet further in a bona fide attempt to bargain as directed by the National Labor Relations Board in its order. Your failure to honor the agreement made when we last met, on

April 2, 1964, can have only one meaning, namely, an unwillingness on your part to bargain with Skyline Homes, Inc. The willingness to meet and bargain with you still remains, even though we are conscious of the fact that you do not represent a majority of the employes of Skyline and that we are confronted with the dilemma of bargaining with your union under compulsion of the National Labor Relations Board, while exposing Skyline Homes, Inc. to the unfair labor charge already filed by counsel representing the majority of the employes in carrying on negotiations with you in the bargaining process when you do not represent a majority of the employes, and in fact the majority of the employes do not want to be represented by your union.

We do not propose to let you dictate the language of any correspondence on behalf of Skyline Homes, Inc. It is difficult to understand why, with full knowledge of the facts, you would advise at our meeting of April 2, 1964, at Ocala at the Company offices, that you would need time to prepare the precise proposals for negotiations with Skyline Homes, Inc.; that we would be advised by you when you had your proposals ready and since that time you have repudiated the promise and undertaking stated, and now threaten Skyline Homes, Inc. with using the agency of the National Labor Relations Board for contempt proceedings.

The ineluctable conclusion must be that you have never attempted to bargain in good faith with Skyline Homes, Inc., but on the contrary, have sought to manufacture a false claim with which you propose to offer harm to Skyline Homes, Inc.

The tenor of your letter would clearly indicate that whatever advice you have received from whatever source, and which advice you evidently have followed in your communication, was intended to

avoid your embarrassing situation in trying to bargain for employes who do not want you to represent them and creating instead a diversionary situation with which to punish our client.

It is the writer's considered judgment that the blame for no further bargaining is yours and yours alone, and that any assertion to the contrary on your part is wholly without foundation and/or merit.

We suggest that you have some respect for your promises and advise us when you are ready to meet for the purpose of continuing to negotiate or bargain.

Yours very truly,

DAVIDOW & DAVIDOW
Larry S. Davidow

LSD:ny

cc: Mr. Harold A. Boire, Director
National Labor Relations Board 12th Region
Rjetc

7. The Court of Appeals completely overlooked and ignored the undisputed testimony that at the last negotiation meeting of April 2, 1964, the Union representative agreed to fix another date for the next meeting at which it would come up with definite proposals on the subjects to be discussed. This the Union failed to do, and instead, sent the letter of April 6, *supra,* after a conference between the Union representatives and NLRB officials of the 12th Region.

8. The Court of Appeals completely overlooked and ignored the fact that negotiations had been in progress and there was no impasse of any kind until the creation of an alleged impasse based upon the demand of the Union, supported by the NLRB, that the employer agree in the written contract as a preliminary to further meeting, that

it recognized the Union as the sole bargaining agent for its employees. (Letter of Conary, *supra*)

9. The Special Master found: "However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree." The NLRB filed objections to this finding. The Court of Appeals in its Opinion "substantially adopts the conclusions and findings of the Master". It did not rule on the objections of the NLRB. It must be assumed, therefore, that the finding was accepted. However, the Appeals Court ignored and/or overlooked the fact that the so-called impasse which caused the Union to break off negotiations was its insistence upon a recognition clause in the contract. This insistence was supported by the NLRB, despite the testimony of Union officials that it was not necessary to have a recognition clause in the contract, and was so found by the Special Master.

10. The Opinion of the Court of Appeals is in conflict with the Opinion of this Court in the case of *N.L.R.B. v. John Brown, et al.*, 380 U.S. 278; 13 L Ed 2d 839 (3-29-65), by reason of the fact that by its affirmance of the Special Master's findings, which were inconsistent with and contrary to the facts and testimony adduced at the hearing, it rubber-stamped the Special Master's findings.

In this *NLRB v. John Brown* case, this Court, on page 849 L. Ed. said:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts

> would abdicate their responsibility if they did not fully review such administrative decisions. * * * Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.'"

11. The Court of Appeals overlooked and/or ignored the perjury committed by Union representative Warren P. Conary in his testimony before the Special Master wherein he testified falsely as to a statement made by Petitioner's counsel in reference to Petitioner's recognition of the Union.

12. There is no basis for the Court of Appeals' finding that the Petitioner restricted "negotiations to 'day-to-day' terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining." There is not a scintilla of evidence or showing to support such a finding.

The Union had agreed to set a date for the next meeting, at which it was to submit proposals on the questions of wages, hours and conditions of employment. These specific fields of negotiation are set forth in the Labor Management Relations Act. Obviously any matters subsidiary to or included in these specific fields would be taken up in the course of negotiation. The Union failed to keep its promise to set another date for the next meeting for negotiations. Matters under discussion never went beyond the insistence of the Union that the employer agree to insert in the written contract that it recognized the Union as the sole bargaining agent for its employes.

13. The Opinion of the Appeals Court ignores the fact that the alleged impasse cutting off negotiations did not occur until after the Union representative had met with the Regional Office of the NLRB following the negotiation meeting of April 2, 1964, between Petitioner and the Union. In this April 2 meeting the Union had asked

for a continuance and had agreed to set another date for a meeting at which it would return with specific proposals on the questions to be negotiated as provided in the National Labor Relations Act. Following a conference of the Union representative and the Regional Office of the NLRB, the letter of April 6, *supra,* was sent to Petitioner, breaking off negotiations. This action of the Regional Office of the NLRB in interfering in the negotiations between the Petitioner and the Union was in violation of the law and decisions of this Court and Courts of Appeals.

The action of the Regional Office of the NLRB was in effect an attempt to coerce the Petitioner to accede to the improper demand of the Union that there be a written acknowledgment in the contract that the employer recognized the Union as the sole Bargaining agent, as a condition precedent to resuming collective bargaining.

In the case of *Leonard v. N.L.R.B.*, 205 F 2d 355, the Appeals Court on page 357 said:

> "As stated by the Fifth Circuit in *N.L.R.B. v. Dorsey Trailers,* 179 F 2d 589, the Board 'is no "Poo Bah" to loose or bind at will.' Congress made it an agency not as a *labor* board—created to aid labor in its struggle against the employer. As shown by its name, Congress created it to be a board concerned with the administration of 'labor relations' in which the rights of the employer are to be as jealously guarded as those of the employee. We repeat the gustatory comment, erroneously attributed to Judge Learned Hand, that the Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act. *Capital Service, Inc. v. N.L.R.B.*, 9 Cir. 204 F 2d 848, 853)."

In the case of *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F 2d 720, the Court on page 734 said:

> "The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants. When, in the prosecution of a complaint, facts come to his knowledge showing that there was insufficient basis for proceeding thereon, it was his duty to make a motion to amend. *International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 U.S. App. D.C. 91; 289 F 2d 757, 760; *American Newspaper Publishers Ass'n v. N.L.R.B.*, 193 F 2d 782 (C.A. 7), cert. den., 344 U.S. 821, 73 S Ct 10, 97 L Ed 632."
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> • • •
>
> "It is appropriate to note here a statement by Judge Friendly in the Superior Fireproof Door case: 'Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself.' 289 F 2d at 724." (Emphasis ours.)

The Opinion of the Court of Appeals in the case at bar is in direct conflict with opinions of other Circuits, as appears by the cases of *N.L.R.B. v. Herman Wilson Lumber Co.*, 355 F 2d 426, Court of Appeals for the Eighth Circuit; *N.L.R.B. v. Alva Allen Industries, Inc.*, 369 F 2d 310, Court of Appeals for the Eighth Circuit, and with the opinion in the case of *Dallas General Drivers v. N.L.R.B.*, 355 F 2d 842, U. S. Court of Appeals, District of Columbia.

14. The Opinion of the Court of Appeals in the case at bar is in conflict with its own opinion in the case of *N.L.R.B. v. Cactus Petroleum, Inc.*, 355 F 2d 775.

RELIEF

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, and that upon the hearing of said Writ of Certiorari, the action of the Circuit Court of Appeals for the Fifth Circuit affirming the findings of the Special Master and adjudging Petitioner in civil contempt of the Court be reversed and set aside and the petition of the National Labor Relations Board to adjudicate Petitioner in contempt of the Court be dismissed.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Petitioner.

APPENDIX

ORDER OF REFERENCE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

February 9, 1965

Before Honorable Elbert P. Tuttle
Honorable Warren L. Jones
Honorable Walter P. Gewin

National Labor Relations Board,
Petitioner,
versus
Skyline Homes, Inc.,
Respondent.
No. 19,352

The National Labor Relations Board having filed its petition praying that Skyline Homes, Inc.. be adjudged in civil contempt of this Court because of its disobedience of this Court's decree entered herein on November 22, 1963; respondent having joined issue; and the Court having found that it is appropriate to designate a Special Master to determine the issues of fact and law raised by the respective pleadings, and at the request of the Court, the Civil Service Commission having certified the names of three competent and qualified Hearing Examiners currently available for appointment, it is

ORDERED that JOSEPH W. KAUFMANN be, and he hereby is, appointed Special Master to take testimony and receive evidence with respect to the issues raised

by the pleadings in this case; that the Clerk shall forthwith furnish the Master with a copy of this order, upon receipt of which the Master shall take an oath, faithfully to perform the duties imposed by this order, and file a copy of such oath with the Clerk of this Court; and it is

FURTHER ORDERED THAT THE MASTER shall have authority, powers and duties, as follows:

(a) To conduct such pre-trial proceedings as may be appropriate to consider the simplification of the issues herein, the possibility of obtaining admissions of facts and of documents; and to conduct or authorize all other matters which may aid in the disposition of the reference, including the entertainment of and disposition of motions for discovery and motions to amend or supplement the pleadings.

(b) With all reasonable diligence, to hold such hearings as may be reasonably necessary to obtain the relevant and admissible oral or documentary evidence from witnesses made available by the parties, or under the compelling process of the Master, at Ocala, Florida, and/or at such other place or places as the Master may deem necessary or advantageous in obtaining said testimony and accommodating witnesses and parties.

(c) To engage a qualified reporter to take and transcribe the testimony adduced at such hearings, each side to pay one-half of the reporter's charges upon the order of the Master.

(d) In accordance with the Federal Rules of Civil Procedure to regulate all proceedings in the hearings before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this order. He may require the

production before him of admissible evidence upon all matters relevant and material to the issues, including the production of all books, papers, vouchers, documents and writings. Upon request of the parties, he may issue subpoenas for witnesses, who shall be paid witness fees and mileage pursuant to the law applicable to witnesses in the courts of the United States. If, without adequate excuse, a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties and remedies provided therefor. The Master may rule upon the admissibility of evidence, subject to review by this Court upon his report. He may put witnesses on oath and may himself examine them. At the request of either party, he shall make a record of evidence offered and excluded, for review by this Court upon his report.

(e) To conduct the hearings with the design and purpose of keeping the inquiry within reasonable bounds confined to the controlling issues in this case. If an objection to a question propounded to a witness is sustained by the Master, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The Master may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The Master shall take and report the evidence in full, unless it appears that the evidence is not admissible on any ground or that the witness is privileged.

(f) With all reasonable speed after the conclusion of the hearings, to file with the Clerk of the Court the transcript of the proceedings and of the evidence, and the original exhibits, together with the Master's

report thereon and his recommendations as to findings of fact and recommendations as to conclusions of law; a copy of said report and recommendations shall at the same time be served upon the parties. The Master's report and recommended findings and conclusions shall be binding upon this Court only in the manner and to the extent the Court deems appropriate. The Master may require the parties to submit, prior to the filing of his report, proposed findings, objections to proposed findings, and briefs.

(g) The compensation and expenses of the Master are to be paid in the first instance by the Board; but final assessment and allocation of all costs, fees and expenses, including the cost of a reporter, are reserved for further order of the Court.

IT IS HEREBY FURTHER ORDERED that upon the filing with the Clerk of the Court of the Master's report and recommendations, the transcript of the proceedings and the original exhibits, the Clerk shall forthwith mail to all parties notice thereof. Either side may file written objections to the Master's report and recommendations but such objections must be filed with the Court and served upon the other side within twenty (20) days after notice of the report. If only one side files objections to the Master's report, that side shall serve and file its brief in support of its objections within forty-five (45) days after filing of the Master's report. If both sides file objections, then the Board shall serve and file the opening brief within the same period of time. The other side shall file and serve its answering brief within twenty (20) days after filing of the opening brief, and a reply brief may be filed within ten (10) days after filing of the answering brief. The Court will then consider any requests for oral argument.

OPINION OF U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19352

SKYLINE HOMES, INC.,
Petitioner,
versus
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition of the Board to Adjudicate Respondent in Civil Contempt.

(August 11, 1967.)

Before BROWN, Chief Judge, JONES, Circuit Judge and BREWSTER, District Judge.

BROWN, Chief Judge: The National Labor Relations Board petitioned this Court to adjudge Skyline Homes, Inc. in civil contempt because of the alleged disobeyance of a decree entered by this Court on November 22, 1963.[1]

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[1] Skyline Homes, Inc. v. N.L.R.B., 5 Cir. 1963, 323 F2d 642, cert. denied, 1964, 376 U.S. 909, 84 S. Ct. 662, 11 L.ED. 2d 607.

That decree enforced the Board's order requiring Skyline to cease and desist from certain practices and to take affirmative action.[2]

Skyline's defense was that it realized it had to deal with the Union, but as it honestly believed the Union did not represent a majority, it was exercising its legal right to have this fact demonstrated.[3]

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[2] The order required Skyline to:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith concerning wages, hours, and other terms and conditions of employment with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292, as the exclusive representative of all production and maintenance employees of Skyline Homes, Inc. employed at its Ocala plant.

(b) In any other manner interfering with, restraining or coercing such employees in the exercise of their section 7 rights of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the Union as the exclusive representative of all of the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(b) Post at its plant in Ocala, Florida, copies of the notice

. . .

[3] The company not only refused to accept an exclusive-representation clause, it refused to acknowledge orally that the union was the exclusive representative. It would only state that it was going to abide by the Court's decree and bargain, but stood by its rights to challenge the union's status by every lawful means, specifically, the appeal from the Regional Board's denial of the company's decertification petition.

The Special Master[4] appointed by this Court to take testimony and receive evidence as to the matter filed a report adverse to Skyline, and Skyline contends that its recommendations are not supported by clear and convincing evidence.

We have carefully considered the evidence which was adduced before the Special Master. It was sufficient to warrant the Special Master concluding that the company in attempting to have the Union decertified as the exclusive representative of the employees shows a lack of good faith. Specifically, the Special Master found that the company acted in bad faith by sending erroneous and misleading letters[5] to the employees as to the relationship between the Union and the employees, by questioning the existence of, and refusing to give expression to, the Union's status as the exclusive bargaining agent, by delaying

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[4] The Board petitioned the Court for an adjudication of contempt on December 2, 1964; on December 21, 1964, the company filed an answer admitting in part and denying in part the allegations contained in the Board's petition. In an order of reference entered on February 9, 1965, the Court appointed Joseph W. Kaufman Special Master to conduct a hearing on the issues raised and to file a report thereon with his recommendations as to findings of fact and conclusions of law.

[5] Skyline's Counsel sent two letters to the employees containing the following:

> "You do not have to belong to any union. If you do not desire to, you do not have to attend the meeting scheduled for Thursday night. If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union,you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board."
>
> ". . . what we have told you, in response to your questions, is supported by the National Labor Relations Board."

Of course, Counsel knew that no such election would then be afforded as stated with respect to a certified union. It was also misleading to tell them that "you do not have to have the Union represent you if you do not want to."

the posting of Board notices,[6] and negating the effect of the notices when they were finally posted, and finally by restricting negotiations to "day-to-day" terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining.

The proof was clear and convincing. This activity amounted to interfering with, restraining and coercing employees in contravention of subparagraphs 1 (a) and (b) and 2 (b) of the order of the Board issued November 14, 1961, as enforced and incorporated in the decree of this Court (see note 2 *supra*).

The Court substantially adopts the conclusions and findings of the Master. Accordingly, Skyline is adjudged in civil contempt of this Court. See *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 5 Cir., 1965, 353 F.2d 76.

Such being the case, Skyline must immediately take the following action to purge itself of contempt:

1. Upon request, bargain collectively in good faith with the union as the exclusive representative of its employees in the unit involved in this case and if any understanding is reached, embodying such understanding in a signed agreement; and also desisting immediately from refusing to so bargain in good faith with the union as such representative.[7]

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[6] The company alleges that in moving its plant to Ocala, Florida, the Notices furnished it by the Board were misplaced thus accounting for the late posting of the notices. The Special Master concluded that this allegation was not supported by any evidence, only "hearsay on hearsay."

[7] We decline at this time to sustain the Board's cross assignment concerning Skyline's refusal to bargain about including a recognition clause in the contract. With respect to future bargaining hereby ordered the matter is too uncertain to declare in advance that any particular matter must be discussed or included in any resulting agreement.

2. Immediately post in conspicuous places in its Ocala, Florida plant, including all places where notices to employees are customarily posted, for a period of sixty (60) consecutive days:

   a. the appropriate portions of the notice originally required to be posted by the Court's decree.

   b. an appropriate notice signed by Skyline which states (1) that Skyline has been adjudicated in civil contempt of Court for violating, resisting, disobeying and failing and refusing to comply with the Court's said decree and that Skyline will take the actions in purgation ordered by this Court, (2) that contrary to the impression created by Skyline, an election under Board auspices has not been imminent, and one is not to be anticipated until the Union has had a reasonable time to bargain on behalf of the employees, (3) that the Union is entitled, contrary to Skyline's prior statement, to represent the employees as their exclusive bargaining agent.

3. Maintain such notices in clearly legible condition throughout such posting period and insure that they are not altered, defaced or covered by any other material.

4. File a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Twelfth Region of the Board, and separately notifying said Director of the Twelfth Region in writing within ten (10) days after the entry of the order of adjudication, showing what steps have been taken by Skyline to comply with the Court's directions, and file further until further order of

the court further periodic sworn statements every thirty (30) days, as to Skyline's bargaining with the Union.

All costs of the proceeding are adjudged against the respondent. These shall include the expenditures made by the Board in investigation, preparation, presentation and stenographic reporting of the case, and the expenses (and salary or fee) of the Master, but shall not include salaries of Board counsel or employees.

RESPONDENT'S PETITION FOR REHEARING

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19,352

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
SKYLINE HOMES, INC.,
Respondent.

RESPONDENT'S PETITION FOR REHEARING

Now comes Skyline Homes, Inc., respondent, by Davidow & Davidow, its attorneys, and respectfully petitions this Court for a rehearing of the above case in which the Court

rendered its opinion on August 11, 1967, for the following reasons:

1. The Court ignored the unchallenged reasonable explanation of Respondent's failure to sooner post the notices involved, which was due to the loss of same when Respondent moved its offices.

2. The Court ignored the repeated manifestations of the prejudiced and biased attitude of the Special Master toward the Respondent and its counsel, so that Respondent was denied a fair and impartial hearing.

3. The Court overlooked the perjury of the Union representative concerning the alleged statements of Respondent's counsel, by which perjury the NLRB sought to assert a claim of contempt of this Court's mandate on the part of Respondent.

4. The Court erred in failing to consider the unchallenged efforts of Respondent to negotiate with the Union as manifested by the undisputed testimony and exhibits.

5. The Court's Opinion denies Respondent's right to legally communicate with its employes as guaranteed by the Labor Management Relations Act (Sec. 158(c) Title 29 U.S.C.A.), as well as the First Amendment to the Constitution of the United States.

6. The Court erred in ignoring the unchallenged fact that until the intervention by the representatives of the Regional Office of the National Labor Relations Board, the Union and the Respondent were carrying on negotiations in pursuance of the Order of the National Labor Relations Board and the mandate of this Court.

7. The Court erred in disregarding the unchallenged fact that the Union representatives had been engaged in a series of negotiations with Respondent, which negotiations

only ceased upon the actions of the representative of the Regional Office of the NLRB in directing the procedure as a result of which negotiations were ended by the Union although Respondent urged the continuance of negotiations.

8. The Court erred in ignoring the fact that although not one of its employes was a member of the Union, Respondent did recognize the Union as the sole bargaining agent and did negotiate with the Union as directed by the Court's mandate.

9. The Court erred in ignoring the undisputed fact that at no time did the Union seek to persuade Respondent's employes to join the Union.

10. The Court erred in ignoring the fact that at no time did any of Respondent's employes ever belong to the Union.

11. The Court ignored the fact that one of the purposes of the Labor Management Act (Section 7, Title 1) is that of affording employes the choice of belonging or not belonging to a union.

12. The Court erred in accepting the position of the NLRB in insisting upon form and not substance concerning collective bargaining on the part of Respondent.

13. The Court erred in virtually denying Respondent's right under the express provisions of the Labor Management Act to voice its honest opinion as long as such expression did not involve a "threat of reprisal or force or promise of benefit" to influence the conduct of its employes.

14. The Court ignored the fact that the representatives of the Regional Office of the NLRB had violated the unbroken line of decisions by the United States Courts of Appeal and the Supreme Court of the United States that

the NLRB representatives were not to seek to influence the conduct of union officials in negotiation with management.

15. The Court erred in ignoring the "right to work" protection for employes as guaranteed by Section 12 of the Declaration of Rights of the Constitution of the State of Florida.

16. The Court erred both as to the law and the facts in reference to the letters sent to the employes.

17. The Court erred in attributing any significance to or effect of the letters by Respondent to its employes, because negotiations had been and were continuing even though the letters had been sent.

18. The Court erred in attributing any relationship between the letters and the negotiations with the Union.

19. The Court erred in ignoring and failing to follow its own decisions in comparable matters involving the relationship of employer and union.

20. The Court erred in ignoring the fundamental proposition that the burden of proof is upon the petitioner, the NLRB, and its General Counsel.

21. The Court erred in ignoring the mandatory language of the Labor Management Act which makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer * * *". (Sec. 8(b) (3).).

22. The Court erred in disregarding the fact that the record is completely silent as to any act on the part of Respondent adversely affecting negotiations between the Union and the Respondent.

23. Unless a rehearing is granted, petitioner will suffer great and irreparable injury in that it will be stripped of its rights as provided in the Labor Management Act,

and Constitution of the United States, and encouragement given to representatives of the NLRB to intervene actively on behalf of the Union in negotiations between Respondent and Union, in violation of the rights of the Respondent.

Petitioner respectfully and urgently requests an opportunity for oral argument in support of its petition.

This petition is based upon the files and records of this Court and cause, the record of the hearing before the Special Master, the original Brief of Respondent filed in this contempt proceeding, and the Brief accompanying this Petition for Rehearing.

DAVIDOW & DAVIDOW,

By: .....

Larry S. Davidow

Attorneys for Respondent,

3210 Book Tower,

Detroit, Michigan 48226.

CERTIFICATE OF COUNSEL FOR RESPONDENT

I, the undersigned, Larry S. Davidow, a member of the law firm of Davidow & Davidow, attorneys for the Respondent in the above cause, do hereby certify that I have had personal charge of the above matter, and that the foregoing petition for rehearing is presented in good faith and not for delay, and that I am duly authorized to present said petition on behalf of petitioner.

Larry S. Davidow

Dated at Detroit, Michigan,
this 28th day of August, 1967.

SUPREME COURT, U. S.

NOV 9 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Excerpt from the Report of the Special Master

(pages 4 through 17)

RECOMMENDATIONS AS TO FINDINGS OF FACT

In May 1960 respondent, an Indiana concern, opened up a plant in Ocala, Florida. In June 1960, 17 of its 33 Ocala employees in the bargaining unit involved signed

union authorization cards. Larry S. Davidow, respondent's attorney, declined to negotiate. Warren P. Conary was the union representative. Charges were filed by the National Labor Relations Board and heard by one of its hearing examiners. His finding of failure to negotiate, and also of coercing employees, was affirmed by the Board in November 1961, which issued an order accordingly. The union wrote requesting negotiations, and then became quiescent pending the course of respondent's appeal to this Court and petition for certiorari to the Supreme Court.

In October 1963 this Court handed down its opinion affirming. The opinion stated, among other things:

> So also we find no basis for Skyline Homes' contention that the lapse of time since the filing of the original charges entitle it to an election. An employer will not be permitted to dissipate the union's majority by a series of Section 8(a)(1) violations and then demand that an election be held.

The record here does not make clear what precisely was the union's change in majority status or any change in respondent's total number of employees.

The decree of this Court, filed November 22, 1963, on the finding of failure to bargain, ordered respondent, first, to cease and desist from refusing to bargain in good faith with the union concerning "wages, hours, and other terms and conditions of employment." The decree also ordered respondent, secondly, to bargain collectively with the union. The decree, in each of these directions, ordered such bargaining with the union *"as the exclusive representative of all the** employees" (our emphasis). The decree also ord-

* The word "its" is used instead of "the", in one of the two directions.

ered respondent to post notices "immediately upon receipt thereof" to the effect that it recognizes the union as the exclusive representative of all employees.

Respondent petitioned the Supreme Court for certiorari, which was denied on February 17, 1964.

Respondent now claims—without proof, although it may be and probably is at least substantially true—that by the end of the litigation the number of its employees was 60, with only three of the original employees remaining, and that the union had far from majority backing; it also points out that no respondent employee at any time has been a union member. Respondent also now intimates, again without proof, but with no vehemence or repetition, that its alleged violations have not been responsible for the union's loss, or further loss, of its majority backing.

By letter of March 13, 1964, the union requested respondent to meet with it on March 20 for the purpose of "negotiating", and by letter of March 17, respondent agreed to "meet" with the union, although at its own plant. The union also advertised a meeting with the employees for the night of March 19 at a public hall. By form letter of March 17, 1964 (PX 4), sent to each employee, and drawn by Davidow, respondent not only advised employees that they did not have to attend the meeting advertised by the union, but stated:

> If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union, you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board.

On March 19, Davidow himself appeared at the Tampa office of the Board, stating that respondent had during moving lost the notices sent to it by the office for posting,

and he obtained new ones. More importantly, he presented an RM petition (PX 5) by respondent, stating that it "questions" recognition of the union. He told Mr. Strickland, the compliance officer, that, although respondent would post the notices and bargain to avoid contempt, the union had long since lost majority status and that an election would prove this. Strickland told him that, apart from any question of current union majority, the Court's decree obliged him to bargain for a reasonable time. He cited leading court cases, and expounded on them. Mr. Cole assistant to the Regional Director, said that a reasonable time was usually one year. Davidow finally agreed that actual filing might be withheld until he had time to study the cases.—Respondent did not post the notices by the end of working hours on March 19, and the union meeting with employees that night had an attendance of only 34 employees.

It was with this background of (1) the March 17 letter to employees as to a Board election re a union, (2) the RM petition directed to this, and (3) tardy notice posting, that Davidow met Conary, the union representative, at the March 20 "bargaining" meeting. Conary cited the difficulty in getting the employees together and said that he came to the meeting without proposals; he accordingly asked for an adjournment to April 2, which was agreed to by Davidow. Conary also asked at the meeting that a letter be sent to employees retracting the election reference in the March 17 letter, but Davidow declined.

Instead of a retraction letter, respondent wrote another letter to employees, dated March 20 (PX 8); stating, among other things, that:

> you do not have to have the union represent you if you do not want to.

Davidow also wrote to the Regional Board insisting that the RM petition be filed, and purporting to distinguish the cases cited to him. The petition was filed and dismissed, with a statement quoting the opinion herein of this Court on majority status (see quotation, *supra*), and quoting from the *Franks Bros.* case cited by this Court.

It was with this further and cumulative background of (4) the March 20 letter telling employees they did not have to be represented by the union, (5) the actual filing of the RM petition for decertification or an election, that Davidow met with Conary at the April 2 meeting theretofore arranged. Conary asked whether, in view of respondent's letter to employees and its RM petition, respondent did recognize the union. Davidow said that he would do what the order said, that he would "negotiate"—in fact insisted on going ahead with this "negotiating"—but he reserved his appeal rights on the RM petition.

Davidow took much the same stand on a proposed contract recognition clause submitted by Conary later at the meeting. He also refused to consider two or three other proposed clauses, of a general nature. The union had quite a number of additional proposed clauses, also of a general nature, but did not submit them.

An interrupting factor was that Davidow stated that he wanted a "short" contract of two or three pages, and one confined to "wages, hours, and working conditions" (although the decree uses a much broader phrase than "working conditions"). Conary had nothing at all on wages or hours, a surprising omission, to be sure; he testified that this was because employees wanted to continue on piece rates and he did not know piece work details. Davidow said that Conary's proposed general clauses, i.e., on grievances, arbitration, and the like, were not the day-to-day working conditions, such as sanitary facilities, which he contended were alone contemplated by the de-

cree.—Conary states in his work report, drafted soon after the meeting, that the union "suggested a recess for two weeks to see about preparing a shortened contract."

Conary testified that he and his colleagues decided after the meeting against presenting a proposed short contract, and that, after conferring with Strickland, they decided on first demanding recognition. Conary wrote respondent a curt letter reciting its "refusal to recognize us on April 2nd"; Davidow, calling the letter "astounding", replied by insisting on a date for the next meeting, "even though you do not represent a majority."

On April 15, 1964, the union wrote the Regional Board that respondent would not negotiate and was interfering with its bargaining right. On April 22, 1964, Conary swore to a voluminous affidavit, with exhibits, prepared by Strickland, with a stated conclusion that respondent was in contempt of this Court's decree. Conary also, however, wrote Davidow that he would arrange another meeting upon "notice" that respondent recognized them (a decided retreat, from Conary's request for a contractual recognition clause, to his original query as to whether respondent recognized the union).

In the meantime, a local attorney (Mr. Musleh) was retained by employees. He filed a decertification petition (signed, apparently, by a majority of them) and also filed unfair labor charges against respondent for dealing with a minority union. These petitions were ultimately to be denied, but Davidow used them as an argument against explicitly recognizing the union, despite renewed efforts and legal discussion with him by Cole and Strickland.

By letter, dated May 4, 1964, Conary, after close consultation with Strickland, advised respondent that the union would ask that it be cited for "contempt" and that

no further meeting would be had unless it wrote its employees retracting statements in its prior letters as to a forthcoming election, etc. Davidow's answer charged bad faith and repeats that the union does not represent the majority. By letter of June 5, the union again asked for retraction and "your informing me . . . that you recognize" the union (i.e., again less than contractual recognition).

In June the local attorney for employees asked this Court for review of the denial of their decertification and unfair practice petitions, but met with dismissal in August for lack of jurisdiction. The present petition to punish for contempt was filed on December 2, 1964.

RECOMMENDED CONCLUSION (FACT AND LAW)

I. The opinion therein of this Court expressly and adversely passed on respondent's contention that an employer may dissipate a union's majority by labor act violations and then demand an election—the very contention persisted in by the respondent after the opinion was rendered. The decree implements this by directing respondent to negotiate with the union "as the exclusive representative of all its employees", i.e., even though only a minority may still be backing it.—Moreover, the express language of the Court's opinion herein, as well as that of leading Supreme Court cases, was quoted by the Regional Board to Davidow or the respondent, so that no claim of ignorance thereof can be entertained.

Assuming that under the working of the decree respondent may properly make the showing, it actually has made no showing that its unfair labor practice violations have not been the cause of any dissipation of the union's majority.

II. This Court expressly found that respondent failed to bargain collectively with the union (and also was guilty of Section 8(a)(1) violations)—a bad record for a respondent in a contempt proceeding for failing to bargain collectively, and one which may receive some consideration in determining whether or not there has been bad faith in bargaining.

III. The Court's decree (November 22, 1963, cert. denied February 19, 1964) required not only bargaining with the union, and desisting from not doing so, but bargaining with it "as the exclusive representative of all its* employees," these words being used twice in the dual direction. Notices were ordered posted accordingly.—It was therefore mandatory for respondent not merely to negotiate or discuss with the union, i.e., as a "nobody" or a volunteer, but to negotiate with it as such representative of all employees. For the purpose of determining whether or not it was in contempt of this provision of the decree, it is not necessary to enter into the semantics as to whether or not respondent was under a duty affirmatively to "recognize" the union (i.e., even apart from the notices posted by it, but contradicted by its letters to its employees).

IV. Respondent started off by its letter of March 17, sent to employees—drawn by Davidow, an experienced labor attorney—telling them that they would have a Board election on union representation, if a majority, as respondent therein stated it believed, did not desire the union.—This was contemptuous of this Court's decree, and supporting opinion, if not an actual contempt, and was at least a strong indication of bad faith in connection with the negotiation directed by the decree.

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* Instead of "its" the decree uses "the" in repeating these words.

V. Davidow, respondent's full agent in these dealings and negotiations, presented on March 19, and later filed, respondent's RM petition for decertification, wherein it "questions" union recognition.—This was further contemptuous conduct, if not actual contempt, and was affirmative evidence of bad faith in negotiating, particularly considering the regional board's meticulous advice and citations on the subject. Indeed, actual contempt is indicated, in view of the decree's mandate, both in its cease and desist and its affirmative provisions, that respondent negotiate with the union "as exclusive representative of all its (the) employees." However, since it involves resort to legal procedures provided for by law and not expressly prohibited by the decree, perhaps it should not be regarded as actual contempt.

VI. Respondent's withholding posting of the notices, as directed by the decree, until after working hours of March 19, with an employees-union meeting scheduled that very night, was tardy—and a further indication of bad faith, if not a contempt, by reason of failure to file "immediately", as directed by the decree. The claim that respondent lost the first notices is supported by no testimony or other proof, by nothing except hearsay on hearsay.

VII. Respondent participated in the March 20 meeting with the bad faith and past contemptuous conduct heretofore indicated, i.e., (1) the March 17 letter to employees as to a Board election, (2) the RM petition for decertification, and (3) the tardy posting of notices. Davidow even refused to have respondent send a letter to employees retracting the March 17 statement as to a Board election, although he did grant the union's request for an adjournment to April 2.

VIII. Instead of a retraction of the March 17 letter, there is respondent's letter to employees of March 20, stating in so many words that:

> you do not have to have the union represent you if you do not want to.

This language flies in the face of the words of the decree directing negotiation with the union "as the exclusive representative of all its employees", as well as the notices which had just been posted by respondent, and this could definitely be held to be actual contempt. However, it is sufficient to hold that it constitutes contemptuous conduct and is clinching evidence of bad faith.

IX. Respondent came to the April 2 meeting, with the union, contaminated by its further acts of bad faith and contemptuous conduct of (4) telling the employees that they did not have to have the union represent them, and (5) actually filing the RM petition. At the meeting Davidow refused to say that he recognized the union. He stated that he would negotiate with the union, but it is found that the real meaning of this was that he would talk to it as a "nobody" or a volunteer, and so regard it; he studiously avoided, here or elsewhere, adding the words "as exclusive representative of all employees", or a reasonable equivalent thereof. It is fair to conclude, and it is concluded, that this failure to deal with the union "as exclusive representative of all its employees" is and was a contempt. However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree.

Respondent's efforts to restrict so-called "working conditions" to day-to-day working conditions is further indication of bad faith and contemptuous conduct, and could

well be held a contempt in itself were it not out of regard for the union's own imperfect negotiating. Respondent violated the direction of the decree to cease and desist from refusing to bargain in good faith on "other terms and conditions of employment", and the decree's affirmative direction, referring to no express subject matter, to "bargain collectively."

X. The union failed to come to this April 2 meeting with any proposals on the fundamentals of wages and hours, but came only with proposed "working conditions", such as clauses on arbitration and grievances, of a boiler-plate variety. The union representative testified that it was unable to formulate proposals on wages and hours because employees wanted a piece-work system, on which the union was not prepared.—This inability reflects no glory on the union as engaged in adequate negotiation. However, the issue here is respondent's conduct and good faith, not the union's. It is clear that the union's conduct did not cause respondent's contemptuous conduct.

XI. Davidow at this April 2 meeting asked for a "short" contract on "wages, hours, and working conditions", and in response, the union "suggested a recess for two weeks to see about preparing a shortened contract." However, the union denies that it actually agreed, or bound itself, to prepare such a draft, and it is indeed doubtful that it had intentions within two weeks to present such concrete demands. In any event there is no doubt that the union determined not to do so, its representative deciding that there were "difficulties." The conclusion is justified, perhaps without full proof, that the "difficulties" were lack of employee backing of the union and also the actual preferences of the employees for piece work, as well as, of course, respondent's obstructive and contemptuous tactics. —However, again it is respondent's conduct and good faith

which are under consideration, and in this case the union's conduct has practically no bearing on this issue. Actually, it was respondent's conduct, particularly in regard to recognition, which may largely account for the union's imperfect negotiation.

XII. Instead of setting a date for another meeting, to discuss a different draft, the union, with the advice of the Board's regional office, concentrated on the recognition issue. It is found here that this "switch" in tactics, if it was such, as respondent contends, was justified by respondent's consistently contemptuous conduct in refusing to deal with the union *as* representative of all the employees, and actually treating it as a "dummy." However, although the union filed charges with the regional office, its representative having signed an affidavit to support contempt charges, and although it advised respondent of possible contempt charges, it did not repeat its demand—made only once, to be sure—for a recognition clause in the contract. Instead, it advised respondent it would meet again simply upon "notice" that it was recognized, and as late as June 5 it indicated that it would be satisfied by respondent's "informing me . . . that you recognize the union."

XIII. It is true that a local attorney, who for all that appears to the contrary acted independently, filed a petition, signed apparently by a majority of the employees, to decertify the union, and also filed a request for the issuance of a complaint charging the respondent with unfair labor practices for dealing with an alleged minority union. —However, it is concluded that any reliance on this situation by respondent does not justify its light regard for the express words of this honorable Court in its decree, as well as in its opinion.

XIV. Apart from the question as to whether the filing of the RM petition for decertification is in itself contemptuous, the fact is that this procedure, and the employees' similar procedures, met with no success in the forum selected and provided for by law.

XV. Respondent does not urge, nor interpose a defense, that it is not bound by the acts of Davidow in its behalf, or that it is excused because its conduct, through him or otherwise, was on advice of counsel. However, two observations may be made: First, Davidow was admittedly (Miller's testimony) respondent's fully authorized agent in dealing with the union and the Board, including its regional office. Second, respondent in its answer (designated Statement), par. 3, has admitted the allegation of the petition (called Motion), par. 3, alleging:

> 3. The decree has been in full force and effect since its entry and at all time material herein respondent, its officers and agents, have had notice and actual knowledge of its terms.

Recommended Conclusions of Law Proper

Respondent has not ceased and desisted from refusing to bargain in good faith, nor has it, upon request, so bargained in good faith, as directed in the decree.

Respondent has not ceased and desisted from refusing to bargain with the union as the exclusive representative of all its employees, nor has it, upon request, bargained with the union as the exclusive representative of all the employees, as directed in the decree.

By so failing to cease and desist and by refusing to bargain in good faith with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No.

2292 as the exclusive bargaining representative of the Company's production and maintenance employees, with respect to wages, hours, and working conditions, respondent Skyline Homes, Inc., has engaged in, and continues to engage in, conduct violative of paragraphs 1(a) and 2(a) of the decree of this United States Court of Appeals for the Fifth Circuit, filed November 22, 1963.

Recommended Decree

Accordingly, it appears appropriate that this Court should adjudge respondent in civil contempt and to require respondent, its officers, agents, successors, and assigns to purge such contempt by doing the following, substantially as proposed by petitioner (which includes the posting of new notices by reason of respondent's conduct negating prior notices posted by it):

(a) Upon request, bargaining collectively in good faith with the union as the exclusive representative of its employees in the unit involved in this case and if any understanding is reached, embodying such understanding in a signed agreement; and also desisting immediately from refusing to so bargain in good faith with the union as such representative.

(b) Immediately posting in conspicious places in its Ocala, Florida, plant, including all places where notices to employees customarily are posted, for a period of sixty (60) consecutive days copies of:

(1) the appropriate portions of the notice originally required to be posted by the Court's decree;

(2) an appropriate notice signed by respondent which states (a) that respondent has been adjudicated in civil contempt of Court for violating, resisting, disobeying and failing and refusing to com-

ply with the Court's said decree and that respondent will take the actions in purgation ordered by the Court, (b) that contrary to the impression created by respondent, an election under Board auspices has not been imminent, and one is not to be anticipated until the union has had a reasonable time to bargain on behalf of the employees, (c) that the union is entitled, contrary to respondent's prior statement, to represent the employees as their exclusive bargaining agent.

(c) Maintaining such notices in clearly legible condition throughout such posting period, and insuring that they are not altered, defaced or covered by any other material.

(d) Filing a sworn statement with the Clerk of this Court and a copy thereof with the Director of the Twelfth Region of the Board, and separately notifying said Director of the Twelfth Region in writing within ten (10) days after the entry of the order of adjudication, showing what steps have been taken by respondent to comply with the Court's directions, and filing further periodic sworn statements as to the manner of respondent's bargaining with the union every thirty (30) days, until further order of the Court.

(e) Paying to the Board fees and all costs and expenditures, including the Master's compensation and expenses, the cost of the reporter, and counsel fees incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding to adjudge respondent in civil contempt.

It also appears appropriate that the Court should further decree that upon a failure of respondent to so purge itself of civil contempt, the Court will levy a fixed compliance fine against it and a further compliance fine per day as long as the noncompliance continues.

It further appears appropriate that the Court take such other and further action and grant such other and further relief as may be adjudged, just, reasonable, and necessary to assure compliance with the Court's decree and as this proceeding in civil contempt may require.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 27–32) adjudging petitioner in civil contempt of an earlier decree of that court is reported at 381 F. 2d 706. The opinion of the court of appeals in the earlier proceeding is reported at 323 F. 2d 642. The Board decision which underlies these proceedings is reported at 134 NLRB 155.

JURISDICTION

The decision of the court of appeals adjudging petitioner in civil contempt was entered on August 11, 1967, and a petition for rehearing was denied on

September 22, 1967. The petition for a writ of certiorari was filed on October 27, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The court of appeals, in a prior proceeding, enforced portions of a Board order requiring the employer, *inter alia,* to bargain collectively with the union upon request, and to post appropriate notices at its plant. The question presented is whether the court of appeals was warranted in finding that, by its conduct subsequent to the entry of the court's earlier decree, the employer continued to refuse to bargain in good faith with the union and failed to post the required notices, and that the employer was thus in civil contempt of that decree.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

In an earlier proceeding, the court of appeals sustained the Board's finding that petitioner Company had refused to bargain with the Union,[1] in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (323 F. 2d 642). The court found that the Company's refusal to recognize the Union and its in-

[1] "Union" refers to United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292.

sistence that the Union first establish that it had the support of a majority of the employees in a Board election were not in good faith, but only a stratagem for gaining time in order to dissipate the Union's majority, as was evidenced by the other unfair labor practices in which the Company had engaged (*id.* at 648–649).

The court accordingly enforced the Board's order, entering a decree which directed the Company, *inter alia,* to cease and desist from refusing to bargain collectively in good faith with the Union, to bargain with the Union upon request, and to post, immediately upon receipt, copies of the Board's remedial notice at its plant in Ocala, Florida (see Pet. 28, n. 2). Subsequently, the Company's petition for certiorari from this decision was denied by this Court (376 U.S. 909).

In mid-March 1964, following the denial of the Company's certiorari petition, the Union requested the Company to meet with it on March 20 to commence bargaining (Pet. App. 3; PX 1).[2] At the same time, the Union advertised a meeting with the employees for March 19 (Pet. App. 3; PX 2). On March 17, the Company agreed to "meet" with the Union at the Ocala plant on the requested date (Pet. App. 3; PX 3). The same day the Company sent a letter to each employee, advising that the employees did not have

[2] "Tr.", "PX", and "RX" references are to the transcript of testimony, the Board's exhibits, and the Company's exhibits presented at the hearing before the Special Master appointed by the court below (see Pet. 23–26). References preceding a semi-colon are to the Special Master's Findings; those following are to the supporting evidence.

to attend the Union meeting, and adding (Pet. App. 3; PX 4):

> If there are a majority of you (as we believe it to be a fact) who do not desire to belong to the union, you will be afforded an opportunity to express your opinion by secret ballot at an election to be held by the National Labor Relations Board.

On March 19, the Company's counsel—claiming that the Company had lost the notices to employees which the Board's Regional Office had previously sent it for posting as required by the court's decree [3]—requested replacements from the Regional Office (Pet. App. 3–4; Tr. 285). Counsel also sought to file a petition at the Regional Office, seeking a representation election in the bargaining unit at the Ocala plant (Pet. App. 4; PX 5). Regional officials furnished additional copies of the requested notices, but advised the Company's counsel that no question concerning representation could be raised in view of the decree requiring the Company to bargain with the Union (Pet. App. 4; Tr. 285, 288, PX 6). After working hours on March 19, the Company, for the first time, complied with the notice-posting requirements of the court's decree (Pet. App. 4; Tr. 89).

At the initial meeting between the Union and the Company on March 20, the Union asked the Company's counsel, who was also its chief spokesman, to send a letter to the employees correcting the misstatements in the letter of March 17 regarding the possi-

[3] Copies of the notice had been sent to the Company on February 20 (Pet. App. 9; PX 22).

bility of a Board-conducted representation election (Pet. App. 4; Tr. 92). The Company's counsel refused, and instead, on March 20, the Company sent a letter to all employees stating in pertinent part (Pet. App. 4; Tr. 92, PX 8):

> [W]hat we have told you, in response to your questions, is supported by the National Labor Relations Board; namely you do not have to attend meetings if you do not want to, and you do not have to have the Union represent you if you do not want to.

On March 24, the Company insisted upon filing its representation petition (Pet. App. 5; PX 9). The Regional Director dismissed the petition because it was "premature and untimely" (Pet. App. 5; PX 11). The Company filed a request for review of the Regional Director's action with the Board, which request was later denied (RX E, PX 12).

At the next meeting between the parties, on April 2, the Union asked the Company whether, in view of its letter of March 17 to the employees and its petition for an election, it recognized the Union as the employees' exclusive bargaining agent (Pet. App. 5, 10; Tr. 95, 214–215). The Company replied that it would do what the Board's order said—that it would "negotiate," but reserved the right to appeal the Regional Director's dismissal of its representation petition (Pet. App. 7; Tr. 95, 159, 215). When the Union began its presentation of contract proposals, the Company declared that it would bargain only about a short contract of two or

three pages, dealing only with wages and hours and "day-to-day" terms and conditions of employment such as sanitary facilities (Pet. App. 5; Tr. 96, 97, 137, 161, 164, PX 19). The Union concluded that further negotiations would be futile, and requested a two-week recess to enable it to draft a shortened contract (Pet. App. 10; Tr. 174, PX 20). The Union then decided that, before resuming negotiations, it would again seek recognition; so, on April 6, it wrote a letter to the Company seeking recognition as the exclusive bargaining agent for employees at the Ocala plant (Pet. App. 6; Tr. 175–177, RX I). In reply, the Company did not refer to the Union's request, but only insisted on a date for the next meeting, "even though you do not represent a majority of the employees of Skyline Homes, Inc." (Pet. App. 6; RX J).

On April 24, and again on June 5, the Union expressed its willingness to meet with the Company upon receipt of notification that the Company recognized the Union as the employees' bargaining agent (Pet. App. 6–7; RX Q, PX 17). In both instances, the Company refused to accord the Union such recognition (Pet. App. 6–7; RX R, PX 18). The Company also refused the Union's requests that it retract its letters of March 17 and 20 to the employees (Pet. App. 6–7; PX 15, 16, 18). Negotiations did not resume (Pet. App. 7).

On the basis of the foregoing evidence, the court of appeals, in agreement with the Special Master, held

that there was "clear and convincing proof" that the Company had acted in bad faith by (Pet. 29–30):

> * * * sending erroneous and misleading letters to the employees as to the relationship between the Union and the employees, by questioning the existence of, and refusing to give expression to, the Union's status as the exclusive bargaining agent, by delaying the posting of Board notices, and negating the effect of the notices when they were finally posted, and finally by restricting negotiations to "day-to-day" terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining.

Accordingly, the court concluded that the Company had violated the decree previously entered and was thus guilty of civil contempt (Pet. 30), and entered an appropriate decree requiring the Company to purge itself of the contempt (Pet. 30–32).

ARGUMENT

1. Petitioner's basic contention is that the record does not provide clear and convincing support for the findings of the court of appeals that the Company failed to bargain in good faith and that it willfully delayed in posting the notices to employees (Pet. 6, 13–21). Such evidentiary issues do not warrant review by this Court. Cf. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

In any event, the record amply supports the court's findings. The credited and undenied evidence shows that, following the Union's request for negotiations in mid-March 1964, the Company, notwithstanding the outstanding decree requiring it to bargain with the Union, on two occasions advised its employees that, if

a majority of them did not wish to be represented by the Union, a Board-conducted election would afford them an opportunity to revoke the Union's bargaining authority (*supra,* pp. 3–5). It is also uncontroverted that, thereafter, the Company insisted upon filing a petition for a representation election at its Ocala plant, despite prior advice from Board agents that such a challenge to the Union's representative status was untimely (*supra,* pp. 4–5). Finally, the record shows that, on and after April 2, the Company refused to accord recognition to the Union as the exclusive bargaining agent of its Ocala employees, and it restricted negotiations to "day-to-day" terms and conditions of employment, thus excluding other non-economic but mandatory bargaining subjects from negotiations (*supra,* pp. 5–6; Tr. 164).

In regard to the notices, the record further shows that the Company received them soon after February 20, and that it did nothing to comply with the decree's posting requirement until after the close of work on March 19 (*supra,* p. 4). Nor is there any evidence in the record to support the Company's assertion that it misplaced the first set of notices. Moreover, when the Company finally posted the notices, the following day it sent a letter to the employees stating that, "you do not have to have the Union represent you if you do not want to" (*supra,* p. 5).

Upon this record, the court of appeals was fully justified in concluding that the Company had failed and refused to bargain with the Union in good faith,

and had willfully delayed posting the notices to employees, all in violation of the earlier decree.[4]

2. Petitioner's claim (Pet. 8) that the instant decision is in conflict with *International Ladies' Garment Workers' Union* v. *National Labor Relations Board,* 366 U.S. 731, is plainly without substance. That case involved recognition of a union which, at the time it was first recognized, represented only a minority of the employees. Here, on the other hand, it is clear that the Union represented a majority of the employees when it first sought recognition; indeed, that was a necessary predicate for the bargaining order originally enforced by the court of appeals (323 F. 2d at 648). Nor is it material that the Union may have thereafter lost its majority. Where, as here, an employer has been found guilty of an unfair labor practice in refusing to "bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal," the Board may properly require the employer to bargain with that union "despite that union's subsequent fail-

[4] Petitioner's contention (Pet. 17) that the court of appeals acted inconsistently in "substantially adopt[ing] the conclusions and findings of the Master" (Pet. 30), since the Master had stated that a contempt finding could not be grounded on a refusal "to agree on a recognition clause in a contract * * *" (Pet. App. 10), is without substance. Irrespective of the correctness of this statement, the Master went on to find that petitioner had violated the earlier decree requiring the Company to bargain with the Union. In short, petitioner was held in contempt of that decree upon the basis of overwhelming evidence of non-compliance with the bargaining requirement, not merely because it failed to recognize the Union or because no agreement was reached.

ure to retain its majority." *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 705.[5] See also *National Labor Relations Board* v. *Warren Co., Inc.,* 350 U.S. 107, 112.[6]

3. There is similarly no merit to petitioner's contention (Pet. 8–13) that the court of appeals, in relying upon the Company's letters of March 17 and 20 to its employees, contravened the First Amendment to the Constitution and Section 8(c) of the Act.[7] The Company's misleading and erroneous assertions in the letters were not found unlawful in and of themselves, but were merely used as evidence of the Company's intent to act contrary to the clear direction of the court's decree. Neither the First Amendment, nor

---

[5] Petitioner's contention (Pet. 21) that the instant decision is in conflict with *National Labor Relations Board* v. *Cactus Petroleum, Inc.*, 355 F. 2d 755 (C.A. 5), is equally without merit. That case involved a situation where, in the court's view, the employer could properly claim a good-faith doubt as to the union's majority status, so that no violation of the statutory duty to bargain, on the particular facts, could be found. Here, on the other hand, the Company was under a specific court decree requiring it to bargain collectively with the Union. Thus, it could not properly invoke a possible loss of majority status as a justification for its non-compliance with the bargaining order embodied in the court's earlier decree.

[6] Employees, of course, have a Section 7 right to refrain from organizational activity, but, in light of the earlier decree requiring bargaining with the Union, petitioner's reliance on Section 7 (Pet. 6–7) is misplaced. Similarly, the fact that Florida has a "right to work" clause in its constitution (see Pet. 12) is, in the instant circumstances, without significance.

[7] Section 8(c) of the Act provides in pertinent part that: "The expressing of any views, argument, or opinion, or the dissemination thereof, * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(c), precludes the use of such letters for that evidentiary purpose.[8]

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

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[8] *Indiana Rayon Corp.* v. *National Labor Relations Board*, 355 F. 2d 535 (C.A. 7) and *National Labor Relations Board* v. *Herman Wilson Lumber Co.*, 355 F. 2d 426 (C.A. 8), relied on by petitioner (Pet. 8), are clearly distinguishable. Each of the cited cases involved allegations that an employer's statement to employees violated Section 8(a)(1) of the National Labor Relations Act, in that the statement itself contained a threat of reprisal or a promise of benefits; there the courts simply concluded that the statements constituted mere expressions of opinion, and thus were not violative of the Act.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *;
> >
> > * * * * *
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
> >
> > * * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

* * * * *

SEC. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

REPLY BRIEF OF PETITIONER SKYLINE HOMES, INC.

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(Numbers in parentheses are references to the pages of the transcript of the Pre Trial Hearing and the transcript of the testimony taken before the Special Master, unless otherwise indicated.)

Because of the several inaccuracies as to facts and law contained in the Brief of the National Labor Relations Board, we feel obliged to file a reply brief.

On March 19, 1964, the company's counsel, at the regional office of the NLRB in Tampa, made known that the required notices to be posted had been lost or mislaid in the moving of the company's office in Ocala, and requested that a new set of notices be furnished accordingly.

During this conference, the Regional office counsel delivered to Skyline's counsel another set of notices that were to be posted. Skyline counsel, upon leaving the regional offices of the NLRB in Tampa, drove directly to Ocala and upon arrival there, the notices were immediately posted, all this being done on the same day (285-287).

At the same time, counsel delivered a petition to the regional office seeking a representation election at the Ocala plant. Counsel for the regional office of the NLRB claimed that such a petition could not be processed, and furnished a list of legal citations in support of that position. Counsel for Skyline stated that he would look over these authorities and advise counsel for the regional office whether he was in accord with such position, and if he were not, he would insist upon the petition being processed in the usual manner.

Skyline counsel later reviewed the citations claimed by the regional office counsel to be controlling as to a representative petition, and having considered the same, advised the Regional office in Tampa by letter that he was not in accord with such claim and that in his opinion Skyline had a right to have its petition considered and passed upon.

At the first meeting that occurred between the union and the company on March 20, 1964, Skyline counsel did not agree to have a letter sent to Skyline employes as requested by the union representative, but urged that bargaining begin immediately on whatever demands the union

had concerning a proposed contract. At this first meeting it developed that the union representatives had no proposals of any kind to offer, having come unprepared for that purpose. It was the union that suggested that that first session terminate and that another meeting for the purpose of negotiation take place in the near future at a time to be mutually agreed upon (123). To this the company assented.

At the second meeting on April 2, the union presented sheaves of typewritten copy without any reference to wages, hours or working conditions. The Trial Examiner described this as "boiler plate" (249). Again Skyline's counsel asked for specific provisions on wages, hours and working conditions, and again the union representatives were unprepared to furnish any such information (138-139). It was at this second meeting that counsel for Skyline advised the union representatives that although the company doubted that the union represented a majority of the employes involved, the company would negotiate with the union as directed by the mandate of the Court and the order of the National Labor Relations Board.

Company counsel also advised the union representatives that while the regional office had denied the petition for representation election, an appeal was being taken and was pending before the NLRB but despite this appeal, the company was ready and willing to continue to bargain in negotiations with the union as ordered by the NLRB (146-147). Again the union had no specific proposals for wages, hours or working conditions that could be discussed. It was at this second meeting that the union representatives in asking for another and third meeting promised to have such proposals ready when next they met. This third meeting was to be held in the near future

at which the questions of wages, hours and working conditions could be discussed (176). The second meeting was then adjourned at the request of the union representative, which was to be followed by the next (third) meeting at a time to be mutually agreed upon.

Instead of the third meeting taking place as agreed upon between the union and the company, the union wrote a letter to the company on April 6, 1964, breaking off all negotiations unless the company agreed to a formula which was wholly unnecessary and had nothing to do with wages, hours and working conditions. The hearing before the Special Master disclosed that this letter of April 6 resulted after the union had met with representatives of the regional office of the NLRB in Tampa, Florida (170-173; 194, 235). This demand was made despite the fact that the union representatives in their testimony, and the Special Master, both at the preliminary pre-trial hearing and during the course of the hearing, stated that recognition of the union did not have to be spelled out in so many words nor did it have to appear in the contract. At the pre-trial hearing, the Special Master in discussing the issue of recognition, said (41, 42):

> "Well, let me say this: First of all, the union knew at that time they had a court order which designated them as exclusive bargaining agent for the employees that was already fully adjudicated. And why couldn't the union have gone ahead and said, 'Well, we will straighten this out as we go along'? Just because they did not sign or agree to that clause did not mean that something couldn't be broken down. I suggested something, a caption the way the thing would be signed—it could have been a working arrangement. As to that, they might have searched the mind of Mr. Davidow and asked what his objections were and couldn't it be straightened out.

> "I think the union—maybe it made a tactical error even, if you want to talk in terms of tactics—in not going on and presenting these things if it had them."

The fact of the matter is that up to and including the second meeting on April 2, 1964, the so-called claim of recognition by the union had not been a bar to the carrying on of negotiations. The record is replete with requests on the part of the employer, through its counsel, for continuation of negotiations. The insistence of counsel for Skyline upon negotiating on matters of wages, hours and working conditions was in keeping with the mandate of the Court of Appeals, which provided:

> "it is hereby
>
> "Ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that Skyline Homes, Inc., its officers, agents, successors, and assigns shall:
>
> "1. Cease and desist from:
>
> "(a) Refusing to *bargain collectively in good faith concerning wages, hours, and other terms and conditions* of employment with the United Brotherhood of Carpenters and Joiners of America, Carpenters Union No.2292, *as the exclusive representative of all its employees in the following appropriate unit:* All production and maintenance employees of Skyline Homes, Inc. employed at its Ocala plant, exclusive of all other employees and all supervisors as defined in Section 2(11) of the National Labor Relations Act (hereinafter called the Act);" • • • (Emphasis ours.)

which is precisely what management repeatedly sought to have brought about and which the union, after consultation with and advice of the regional office, refused to do by presenting a fictitious condition.

There is no showing of any kind that the company had committed any act which tended to or did in fact dissipate the claimed union strength among the employes of the company. The hearing before the Special Master in 1964 disclosed for the first time, so far as the company is concerned, that at no time did any employe ever belong to the union; at no time did the union ever seek to persuade or obtain membership in the union from any of the company's employes (154). There was the definite statement by the union representative that no effort was made at any time to organize the employes of the company (155). There was no testimony of any kind that any act of the company deterred anybody from joining the union.

A general discussion occurred at the Pre-Trial hearing before the Special Master on March 25, 1965, among the Special Master, counsel for the NLRB and counsel for the company. It was brought out that at the time of the original proceedings in 1961, respondent had 34 employes (38). At the time of the Pre-Trial hearing there were closer to 60 than 50 employes (39). The Special Master made the statement to the effect that the rule as to not permitting an employer to "propagate by his own doing" was not applicable in the instant case where there was an increase of employes from 20 to 60—"that was not due to the employer's wrongdoing", "that is entirely different. So it is not true of this result we have today, the disproportionate result, if that is the case, of the employees not having the union is due to the employer" (39).

At no time before or during the hearing was any question raised concerning the delay in posting the Board's notices, a delay which was beyond the control of the company by reason of its offices having been moved. Counsel for the company explained what had happened, which was not challenged by anybody at any time (285-287).

ARGUMENT

1.

Petitioner's basic contention goes beyond the claim that the record does not provide clear and convincing support for the findings of the Court of Appeals that the company failed to bargain in good faith, that it wilfully delayed in posting the notices to employes.

There is absolutely no testimony of any kind in the record to justify such an erroneous decision on the part of the Court of Appeals. The case quoted by counsel in support of its position, when it seeks to minimize the gravity of the erroneous finding of the Court of Appeals, does not offer any support for such a contention. On the contrary, this case, *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, quoting Rule 52(a) of the Federal Rules, provides, in part:

> "Findings of fact shall not be set aside unless clearly erroneous," * * *

In the instant case the finding of the Court of Appeals is not only erroneous, but is based upon non-existent facts.

The record establishes unequivocally that there had been two meetings for negotiation, both of which were adjourned at the behest of the union representatives. On both occasions the union representatives did not have ready or prepared the salient points for negotiation as laid down by the Court of Appeals, namely, questions of wages, hours and other terms and conditions of employment (the last phrase is synonymous with working conditions).

2.

We take issue with the claim of the NLRB counsel that the case of *International Ladies' Garment Workers' Union v. National Labor Relations Board,* 366 U.S. 731, "is plainly without substance." In the case at bar, the testimony at the hearing before the Special Master disclosed that at no time did any of the employes belong to the union. In the case *supra,* the employer was led to believe that the union did represent a majority of its employes and did in good faith bargain. It was disclosed afterward that the representation of the union was unfounded and the employer was found guilty of an unfair labor practice. In the case at bar, not only did the company feel that the union did not represent a majority, but there was added to this the fact that a group claiming to represent a majority of the employes, through their own counsel, had filed a petition with the regional office of the NLRB for an election to deny the right of the Carpenters Union to represent them. The company in the case at bar was therefore in exactly the same position as the situation in the *International Ladies' Garment Workers'* case *supra.*

At the time of the hearing before the Special Master, the number of employes had increased from 34 to between 35 and 60. The Special Master at the Pre-Trial hearing recognized the fact that the increase in employes was due to the business having improved and that this was not a situation where there was a diminution of union representation due to the employer's wrongdoing (39).

We are constrained to again call this Court's attention to the following salient facts:

(1) At no time was a single employe a member of the union.

(2) The union at no time made any effort to persuade any of the employes to become a member of the union.

(3) At no time was any effort made by the union to organize the employes of the company.

(4) The continued willingness of the company to negotiate with the union under the direction of the Court and the NLRB.

(5) The union terminated the negotiation that had been carried on through two meetings.

It stands undisputed that the union broke off negotiations after the union representatives had a conference with the director of the regional office of the NLRB. It was admitted that at the second meeting on April 2, 1964, which was adjourned at the request of the union representatives, the union representatives were to set another date within approximately two weeks and come back with definite proposals on wages, hours and working conditions. It stands undisputed that the union representatives at the April 2 meeting came with 19 or 20 pages of a proposed contract (96-98), of which the first three pages (which were the only ones presented to the employer) were matters of preamble (101-104).

The Special Master questioned the union witness: "Now, do I understand that you had come into this conference room with a completed proposed contract, proposed contract in full?" and the witness answered, "The contract was not completed, no, but a large proportion of it was. It was completed to the point of—to the point that we could go until we had closer contact with the company and could get certain information." (98) And this proposed contract was to be presented without the union coming up with any

concrete proposals as to wages, hours and working conditions. The employer requested a short contract of two or three pages covering the subjects stated in the decree of the Court of Appeals. Obviously the inability of the union to come up with any concrete proposals of wages, hours and working conditions was due to the fact that it did not have a single employe as a member of its union.

3.

It is difficult to answer the specious argument contained in Section 3 of the Brief of the NLRB. If, as is admitted, the company had the right to send the letters to its employes expressing its opinion, then how can those letters be used as the background to build up a petition for contempt? The contents of the letters to the employes were neither erroneous nor misleading. The company had the right to express its opinion both as to the lack of the union's majority backing and its expectation that an election would be held. The National Labor Relations Act itself specifically provides that the employes have the right to engage in all activities set forth, but • • • "shall also have the right to refrain from any or all of such activities," • • • (Sec. 7, National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.)). It became and was the duty of the National Labor Relations Board to dismiss its contempt proceedings when it learned at the hearing before the Special Master that no employe of the company had joined the union and the union had never sought to organize the employes. The contempt proceeding of the NLRB brought about the incredible situation of charging the company with refusing to bargain when the record conclusively shows that the union had broken off negotiations and continued to refuse to bargain despite the efforts of the company to persuade the union to meet again.

CONCLUSION

We respectfully submit that the questions presented in the petition for Writ of Certiorari are of outstanding significance in the field of labor relations and constitutional rights, and that unless certiorari is granted, petitioner will suffer great and irreparable injury.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SKYLINE HOMES, INC.

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WO. 2-8745—WO. 2-8732

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OCTOBER TERM, 1967

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Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SKYLINE HOMES, INC.

Now comes Skyline Homes, Inc., petitioner by Larry S. Davidow, its attorney, and petitions this Honorable Court for a rehearing of its Petition for Writ of Certiorari, on the grounds hereinbelow set forth.

1. Petitioner Skyline Homes has been denied the right of free speech and free press, and has been denied the equal protection of the laws, in violation of the First and Fourteenth Amendments to the Constitution of the United States, by the action of the National Labor Relations Board,

through its regional office, in failing and refusing to abide by and comply with the provisions of the Labor-Management Act by its unlawful interference in the negotiations between Petitioner and the Union, and in relation to Petitioner's letters to its employes.

2. National Labor Relations Board counsel, in the brief filed in opposition to Petitioner Skyline Homes' petition for Writ of Certiorari, for the first time admitted that the letters "were not unlawful in and of themselves"; nevertheless, the NLRB as well as the Union demanded that Skyline Homes retract the letters. In addition, the NLRB stressed the importance of the letters in both the hearing before the Special Master and in its argument to the Court of Appeals, as is demonstrated in the Opinion of the Court of Appeals (Fifth Circuit), in which the Court states that the letters and refusal to retract are part of the "cumulative background". (Pp. 3, 4, 5 of Appendix to Petition for Writ of Certiorari.)

3. The record conclusively shows that Petitioner Skyline Homes committed no act that did interfere or could have intefered with any union organizing activity. On the contrary, the Union made no effort to organize Petitioner's employes since 1960, and relied on the NLRB to forcibly compel Petitioner Skyline Homes to deal with the Union as the sole bargaining agent for its employes, although not a single employe of Petitioner Skyline Homes was or ever had been a member of the Union, thereby relieving the Union of any necessity for organizing or attempting to organize Petitioner's employes.

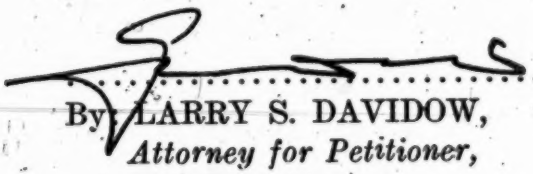
4. Collective bargaining between the Union and Petitioner Skyline Homes had been and was in progress when the NLRB intervened. The NLRB, through its agents, advised, influenced and persuaded the Union to break off nego-

tiations with Petitioner, in violation of the law. Union negotiations would have continued but for interference of the NLRB.

5. The record clearly establishes that the NLRB has not sustained the burden of proof against Petitioner Skyline Homes, and if the decision of the Court of Appeals is permitted to stand, Petitioner Skyline Homes will be deprived of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

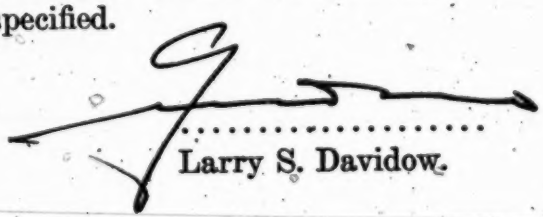
Respectfully submitted,

SKYLINE HOMES, INC., Petitioner,



By LARRY S. DAVIDOW,
Attorney for Petitioner,
3210 Book Tower,
Detroit, Michigan 48226.

I, Larry S. Davidow, do hereby certify that this Petition for Rehearing of the Petition for Writ of Certiorari on Behalf of Skyline Homes, Inc., is presented in good faith and not for delay, and that the Petition is restricted to the grounds hereinabove specified.



Larry S. Davidow.

Dated: January 26, 1968.